



THE REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 289 OF 2010

**KENYA GAME HUNTING & SAFARI WORKERS UNION.....
CLAIMANTS**

VERSUS

**GALAXY CROCODILE LTD
.....RESPONDENT**

RULING

1. This is an application dated 23rd November 2012 seeking to review the award of this court dated 2nd November 2012 on the basis that the same did not factor several issues being leave day due, overtime worked and acting allowance. This application is brought under the provisions of Rule 32 of the Industrial Court (Procedure) Rules and section 16 of the Industrial Court Act. Despite the respondent being served with the application on 31st May 2013 and an Affidavit of Service sworn by J M Ndolo being filed and dated 3rd June 2013, they did not file a reply to the application or attend the hearing that proceeded on the 13th of June 2013.
2. The claimants submitted that they were aggrieved by the court decision on 2nd November 2012 where the court in its decision failed to look on the entitlements calculated by the District Labour Officer before the dispute was reported to the Minister for Labour which included leave, overtime and acting allowances in that the law on employment provide that there are different kind of contracts being limited by time, piece work, casual work, seasonal work and monthly work. That therefore one of the grievant before court Mr. Elly Otuoma had worked for 4 years. That when the matters herein were before the District Labour Officer, they were replaced by 8 new employees and that all the calculated dues included what Elly Otuoma was owed by the respondent. That when Elly Otuoma was replaced, no redundancy benefits were paid like the other employees and thus the current application seeking to have the court award reviewed to include dues not awarded being overtime, leave, wages arrears and acting allowance and the dues from the redundancy. That this matter had been referred to by the Kerugoya High Court to the District Labour Officer.
3. A Court can review a judgement where a new and important matter of evidence is produced that was not possible to be produced at the time the decree was passed or on account of some mistake or error apparent on the face of the record or for any other sufficient reason. Therefore the criteria for the court to apply in an application for review are;

Discovery of new and important matter or evidence;

There is an error or mistake apparent on the face of the record; or

For any other sufficient reason.

4. The Court reading of these principles that apply in an application for review only apply where the aggrieved party has not preferred an appeal as a good ground for appeal in not necessarily a good ground for review. In an application for review, the error or omission must be self evident and it is not sufficient to say neither that the Court would have taken another view nor that the judge proceeded on an incorrect exposition of the law and therefore reached an erroneous conclusion of the law. Therefore a misconstruction of the law or other provisions of the law is not a good reason for a review.
5. I have read the judgement dated 2nd November 2012 where the Judge presiding clearly outlined all the issues that were before him for arbitration. At paragraph 5 it states;

The only issues for determination are whether the grievant should be reinstated and whether the redundancy was unfair.

6. This is what the judge noted upon going through all the pleadings and hearing the parties to the dispute. On the first issue up for determination, the court noted that a reinstatement was not desirable in the circumstances of the case and on the second issue, the court noted that the reinvents from the claimant union had been declared redundant and should be paid one month gross salary as claimed save for Elly Otuoma whose fixed term contract had lapsed. The Judge went on to compute the redundancy dues to each of the grievant on this basis save for John Ngatia who had already received his dues.
7. Therefore there is good reasoning as to how the court arrived at the current award. This was dated 2nd November 2012.
8. Therefore was there discovery of new and important matter of evidence? Or was there an error or mistake apparent on the face of the record or are there any other sufficient reasons to warrant this court to review this award?
9. A court of competent jurisdiction being seized of a matter must determine that matter based on the record before it and the evidence presented before it by all the parties to the suit. A court cannot go out of its way to introduce new claims and evidence that is uncalled for or that is not within its jurisdiction. Based on the facts and evidence presented before the court and the law applicable, such a court must arrive at a decision in conclusion of the dispute. If there are matters of law not addressed, yet the court ought to have addressed, a party is at liberty to present an appeal on this basis. If the court at arriving at its decision it omitted an issue out of error or mistake, or in making its record, then a party can seek the court to review its decision and rectify the error, mistake. Equally where upon reading of judgement a party discovers a new and important matter that was not within their possession at the time the matter was presented in court and proceeded for hearing, that party can cause the court to review its decision based on this new and important evidence now available.
10. What is pleaded by the claimant herein is that the court omitted to award leave, overtime and acting allowances which are matters of law and should have been awarded to the grievants. That Elly Otuoma was on a monthly contract and the court finding that he had no contract and could therefore not benefit from the redundancy was erroneous interpretation of the law and that he should be awarded these dues. That these errors in the award are a matter of law that the court should have been able to address.
11. The error, mistake that is noted by the claimants relate to the overtime, leave, acting allowance and the redundancy dues owed to Elly Otuoma. These are dues owed in law upon a termination of an employee. Where a termination or redundancy occurs, all outstanding leave days dues should be paid to an employee. The overtime worked and not paid at the point of termination must also be calculated and paid in full. The acting allowances as agreed upon by the parties must be computed and the employee paid these dues. As under section 40 of the Employment Act, where there is redundancy declared by an employer, the benefits dues to an employee must be calculated and paid in full. This related to all employees who had a valid contract ongoing at the time of their positions being redundant. However, there are facts that must be specifically pleaded and proved in evidence and clearly outlined as to how they arise in each case. Each grievant having been employed under a specific form of contract and terms, it must be proved how the overtime, leave,

acting allowances arise. These are matters that must be specifically established before the court for a determination as to how they arise and the court must decide on them.

12. My reading of the court decision dated 2nd November 2012 does not indicate that these were issues up for the court determination. Whether the matter had gone before the District Labour Officer in Kerugoya or before a Reconciliator was not the issue or issues before the court, the matter was properly seized by the trial court and the same court gave its decision based on the pleading and evidence presented before it. This therefore does not present any error or mistake on the record of the court.
13. If there was any overtime, leave, or acting allowance due to the grievants, these arose at the time of termination and were not new at the time of filing the claim. This cannot now be presented as new and important evidence after the fact of the judgement. This record does not seem to have been attached to the claim at all and I will not disturb the judge's finding on it.
14. On the contract of Elly Otuoma, the court made a finding and in the application for review, this has not been attached to indicate that he was on a month to month contract or had a contract that can be interpreted to mean that he was on an ongoing contract at the time the other grievants were declared redundant. It is the duty of the party who pleads to submit that evidence in court for the court to arise at a good decision based on the record or matters of fact before it. I will equally not fault the award in this regard.

On these basis therefore, I find the application before court lacks merit for purposes of a review and I will dismiss it. No orders as to costs.

Delivered in open Court and Dated this 2nd day of July 2013.

M. Mbaru

Judge

In the presence of.

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